APPENDIX D

D005952 & D005951

NOT TO BE PUBLSIHED IN OFFICIAL REPORTS

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE *et al.*,

Plaintiffs and respondents,

v.

Steven D. Wiener,

Defendant and Appellant.

(Super. Ct. No. 578784)

APPEAL from an order of the Superior Court of San Diego County, granting a preliminary injunction, Patricia D. Benke, Judge. Reversed.

The City of National City (City) filed a complaint naming as defendants Steven D. Wiener individually and doing business as Chuck's Bookstore, and Patricia Saunders (collectively Wiener) and seeking a preliminary and permanent injunction to restrain Wiener from continuing the operation of an adult bookstore. The complaint pleaded the operation of the adult bookstore violated section 18.69.020(c) and other parts of the City's municipal code, and constituted a common law and statutory nuisance. The court issued a preliminary injunction enjoining Wiener during the pendency of the action from operating the bookstore. We granted a writ of supersedeas staying the injunction. We reverse and vacate the writ of supersedeas.

I

In 1983, the City adopted ordinance number 1699, which included new title 18 to the municipal code regulating adult

entertainment establishments. Adult bookstores are defined as establishments that devote more than 15 percent of the total floor area utilized for the display of books and periodicals to the display and sale of materials characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas." An adult bookstore includes an establishment likewise displaying or selling instruments, devices and paraphernalia designed for use in "specified sexual activities." Adult bookstores are included in the definition of an adult entertaiment establishment. Section 18.69.030 prohibits the establishment of an adult bookstore within 1,500 feet of another adult entertainment business or within 1,500 feet[1] of any school or public park or within 1,000 feet of a residential zone. The establishing of an adult bookstore means the opening or commencement of such business as a new business. Wiener opened the adult book shop in 1986 at 919 National City Boulevard. Wiener concedes his shop is an adult bookstore within the ordinance meaning.

II

The City submitted affidavits in support of its motion for the preliminary injunction. Janice Martinelli, a resident living across the alley from the back of the bookstore, declared children could view the interior through the open back door, a man once exited the rear door and asked her for a kiss, children congregate around the back door and she found a cardboard box with pornographic material in her backyard. Daniel Murphy repeated some of Martinelli's statements, adding a man who had been standing by the back door asked him if he wanted a blow job. Murphy also claimed back door loiterers engaged in drinking and loud talking.

Jack Kearney is a City code conformance officer. He entered the bookstore in December 1986 and observed the magazines and videotapes displayed specified anatomical areas and specified sexual activities. Based on his observations and measurement of the distances to public parks and residential property, Kearney

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[1]The ordinance uses 500 meters. The parties convert the measurement to 1,500 feet. We accept their conversion.

declared the bookstore was an adult bookstore prohibited by section 18.69.020(c) and not entitled to a retail shopping center exemption.

City Planning Director Roger G. Post declared the City area is 5,536 acres; 576.5 acres in the City are available for the location of adult entertainment businesses, including 572 acres zoned for retail shopping centers; included in existing shopping centers is Plaza Bonita with 71.8 acres, and South Key Plaza with 8.61 acres; some 4.5 acres of mostly undeveloped commercial property is available for adult entertainment establishments.

Section 18.69.030 "Prohibitions" include subdivision 16 entitled "Video cassette sales and rentals — adults,"[2] which states chapter 18.69 does not prohibit the location of adult entertainment activities within retail shopping centers "wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view from public streets, parks, schools, churches or residentially zoned property, subject to the issuance of Conditional Use Permits therefore."

Post's declaration purports to interpret section 18.69.030 to permit adult entertainment activities in areas zoned for and within retail shopping centers subject to the conditions of the section. Two City employees declared City records did not include a current business license for Wiener's bookstore or an occupancy permit.

Wiener submitted in opposition the declaration of attorney Thomas F. Homann. The declaration attaches the City's zoning map and relates the zoned areas on the map to the use group categories in section 18.16.090, the City's land use code and permitted uses within each use group category. Based on this analysis, Homann declares a one-acre site is the only available location in the City for an adult entertainment business and dipsutes Post's contention 500 acres of retail shopping center zoned areas are available.

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[2]After the court issued the preliminary injunction, the City on June 2, 1987, amended section 18.69.030 to set forth the retail shopping center exemption in a separate subsection numbered 18.69.030(c).

We state applicable standards for issuance of preliminary injunctions and their review. In *IT Corp.* v. *County of Imperial* (1983) 35 Cal.3d 63, the county issued a conditional use permit (CUP) authorizing IT to dispose of geothermal and pesticide wastes. The county claimed and the trial court found IT was dealing with other hazardous waste material not authorized in the CUP and the preliminary injunction issued enjoining IT from disposing of the unauthorized materials at its plant. The order did not restrain IT from continuing to dispose of geothermal and pesticide wastes. The court laid down the standards for issuance of an injunction sought by a governmental entity:

> "Where a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." (*IT Corp.* v. *County of Imperial, supra*, at p. 72. fn. omitted.)

The rules governing our review of the order are clear. The grant of a preliminary injunction on a verified complaint, together with declarations, rests in the sound discretion of the trial court even through the evidence may be in conflict. Absent an abuse of discretion, the order must be affirmed. Abuse of discretion is found when the trial court order exceeds the bounds of reason or contravenes the uncontradicted evidence and the burden rests upon the party challenging the order to make a clear showing of abuse of discretion (*IT Corp.*, *supra*, at p. 69.)

Kearney's declaration produced by the City declared the bookstore was an adult bookstore within the ordiance meaning. Wiener does not produce any evidence to the contrary. Whether it is reasonably probable the City will prevail on the merits depends

upon the validity of the ordinance. In points and authorities filed in the trial court, the City stated the question:

> "Plaintiffs acknowledge that a municipality cannot impose an outright ban on adult entertainment establishments. Defendant acknowledges that a municipality may regulate the location of such establishments by requiring them to be dispersed or congregated. The question in this case then is whether National City's ordinance is a valid time, place, and manner restriction regulating the location of adult businesses, or whether it constitutes an impermissible ban."

Both parties cite the same cases to us to support their positions. *Young* v. *American Mini Theatres* (1976) 427 U.S. 50 held the First and Fourteenth Amendments did not invalidate zoning ordinances of the City of Detroit requiring an adult theatre to be located not less than 1,000 feet from any two other regulated uses such as bars, adult bookstores and hotels and not less than 500 feet from a residential area. The court noted the ordinance simply placed a limitation on the place where adult films may be shown and explained in footnote 35 at pages 71-72:

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that '[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight.' [Citation.]"

City of Renton v. *Playtime Theatres, Inc.* (1986) 475 U.S. 41 [106 Ct. 925], considered an ordinance concentrating adult theatres, concluded it was a time, place and manner regulation and held it valid. The court found the ordinance served a substantial governmental interest and allowed for reasonable alternative avenues of communication. On this last point, the court noted some 520 acres or 5 percent of the land area of the city open to use as adult theatre sites which included acreage in all stages of development from raw land to developed industrial,

warehouse, office and shopping space (at p. 932). Responding to the contention the 520 acres was not truly available in that the land was occupied by other businesses and none was for sale or lease, the court replied:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' [citation] we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." (*City of Renton* v. *Playtime Theatres, Inc., supra,* at p. 932.)

Neither of these cases concerned preliminary injunctions. *Young* and *Renton* were actions for declaratory relief and permanent injunction against the cities there involved. Both went to full-scale hearings with factual findings made by the trial courts.

City of Vallejo v. *Adult Books* (1985) 167 Cal.App.3d 1169 validated an ordinance prohibiting the location of adult bookstores within 500 feet of a residential zone, park, playground, library or school or within 1,000 feet of another such business and locating such stores in given districts. Finding the ordinance expressed legitimate concerns for city planning, the court went on to consider whether access to protected expression was preserved. At trial, testimony was adduced concerning availability of sites for adult theatres legal under the ordinance and economically feasible.

> "At trial, appellant offered the testimony of John Flanders, a real estate broker and qualified expert on commercial property, who conducted a survey to determine locations for adult bookstores and adult theatres which are both legal under the ordinance and economically feasible. According to Flanders, the three-block downtown area, although zoned C-P and containing a few available sites, cannot accommodate appellant's business due to the presence of another adult book-

store, Bachelor Books, within 100 feet of all other downtown businesses.

"In the remaining districts zoned to accommodate appellant's enterprise under the ordinance, Flanders found a number of legally available sites in south and northwest Vallejo. But in Flanders' opinion, none of these locations would be economically suitable for use as an adult theatre or adult bookstore. Each of the legally available sites was, according to Flanders, either unavailable for rental, without sufficient pedestrian traffic to attract customers, or lacking a building suited to appellant's business. Flanders also testified that it would not be economically feasible for an adult theatre or adult bookstore to purchase a vacant lot and construct its own building in compliance with the Vallejo building code.

"On the other hand, a number of legally available and vacant sites in the Larwin Plaza Shopping Center, Vallejo Industrial Park, and the downtown area were suggested by respondent. While the evidence indicates that the owners of many legal sites, such as in the Larwin Plaza Shopping Center, would not rent space to an adult bookstore or adult theatre, other permissible locations were not, at least according to our review of the record, established as unavailable or unsuitable for adult uses." (*Id.* at pp. 1173-1174.)

Whether the City's ordinance is a valid exercise of its zoning powers or a regulation of conduct prohibited by the First Amendment depends upon whether the ordinance by its terms affords access to adult bookstores or in effect prohibits their establishment in the city. (*Walnut Properties, Inc.* v. *City Council* (1980) 100 Cal.App.3d 1018, 1023.) In *Young, City of Renton* and *City of Vallejo*, the records before the reviewing courts included testimony and evidence to the effect the ordinances there considered did not prohibit or so limit location of adult bookstores as to constitute a prohibition. *Young* noted myriad locations in Detroit for operation of regulated establishments (*id.* at pp. 54, 71-72). *City of Vallejo* found the evidence did not rule out availability of sites for adult entertainment uses (*id.* at pp. 1173-1174). *City of Renton* repeated *Young's* criticism against ordinances with the

effect of suppressing or greatly restricting while holding that adult entertainment establishments must fend for themselves in the realty marketplace on equal footing with others.

Here, the evidence with respect to availability of adult bookstores is inadequate. Apart from retail shopping center acreage, the City concedes only 4.5 acres are available of the 5,536 acres in the City's and Wiener's evidence claims only one acre. As to the shopping center exemption, no evidence is in the record concerning availability of locations in the developed centers, whether locations in those centers meet the criteria of the exemption such as enclosed malls or malls isolated from views from public places or residential property, and, of course, there are no shopping centers in the remaining 500 acres zoned for that use.

On this record[3] we cannot conclude there is a reasonable probability the City will prevail on the question whether the ordinance as drawn in light of the distance constraints and the shopping center exemption effectively bars adult bookstores from National City. We thus conclude the preliminary injunction fails the first prong of the two factors set out in *IT Corp.* in determining the propriety of the issuance of a preliminary injunction at the behest of a governmental entity. While we do not reach it, we do note the second factor, balancing of harms, gives us pause as this preliminary injunction in effect disposes of the lawsuit by shutting down Wiener's business, arguably an irreparable harm.

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[3]We emphasize "this record" because nothing we opine here bears upon the right of the City at trial to adduce evidence of the sort noted in *City of Vallejo* demonstrating the availability of sites for adult bookstores such as to persuade the court the ordinance does not prohibit or severely limit access to protected expression.

Judgment reversed. Stay vacated.

BUTLER J.

WE CONCUR:

KREMER, P.J.

THAXTON, J.*

*Assigned by the Chairperson of the Judicial Council.